

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

STEPHEN HUTCHINGS,
Plaintiff,

v.

BEN FRANKLIN TRANSIT,
Defendants.

No. CV-06-5047-FVS

ORDER GRANTING SUMMARY
JUDGMENT

THIS MATTER came before the Court for a hearing on the Defendant's Motion for Summary Judgment, Ct. Rec. 21, on May 18, 2007. The Plaintiff was represented by Steven C. Lacy. The Defendant was represented by Shannon E. Phillips.

BACKGROUND

I. FACTUAL BACKGROUND

Defendant Ben Franklin Transit ("BFT") is a municipal corporation that provides public transportation services in the TriCities and Benton County. Declaration of Timothy Frederickson ("Frederickson Decl."), June 28, 2005, ¶ 2; Compl. ¶ 1.2. Defendant Timothy Frederickson is BFT's General Manager. The Plaintiff is employed as a bus driver in BFT's Dial-A-Ride ("DAR") Program. Declaration of Stephen Hutchings ("Hutchings Decl."), March 14, 2007, ¶ 2.

On May 15, 2004, BFT sold 22 surplus computers at an auction. Declaration of Allen Walch ("Walch Decl."), June 24, 2005, ¶ 3. The

1 Plaintiff purchased three of the computers. Hutchings Decl. ¶ 3.
2 When the Plaintiff began using one of the computers, he discovered
3 that it had previously been used by Allen Walch, BFT's Administration
4 and Finance Manager. The computer contained a number of files
5 containing sensitive information, including, but not limited to:

6 1) A list of the names, Social Security numbers, and
7 personal bank account information of BFT employees who
8 participated in the direct deposit program;

9 2) Financial reports of BFT board meetings;

10 3) An email listing legal claims pending against BFT; and

11 4) Email correspondence between BFT and an attorney
12 concerning a pending lawsuit.

13 Hutchings Dep. at 19-23.

14 The day that he discovered these files, Hutchings contacted
15 Richard Burnett, BFT's DAR manager, and notified him that one of the
16 computers the Plaintiff had purchased contained "highly confidential
17 information." Declaration of Richard Burnett, June 28, 2005, ¶¶ 1-2;
18 Hutchings Dep. at 30. Two days later, Hutchings contacted Walch and
19 told him, "It looks like I purchased a computer that used to belong to
20 you." *Id.* at 32. Walch offered to buy the three computers back from
21 the Plaintiff for \$30. The Plaintiff declined this offer and instead
22 requested that the computers be replaced. *Id.* at 33. Neither party
23 took any further action regarding the computers the Plaintiff had
24 purchased or the confidential information they contained for a period
25 of ten months. Hutchings Decl. ¶ 6; Defs.' Statement of Facts In
26 Supp. Of Mots. For Summ. J. ¶¶ 24-25.

In March, 2005, while working as a DAR dispatcher, the Plaintiff
came across a computer file that contained the names, employee

1 numbers, and Social Security numbers of between 150 and 200 BFT
2 employees. *Id.* at 56. This file was located on a drive "readily
3 accessible to any workstation at BFT." Hutchings Decl. ¶ 7. Two BFT
4 mechanics also saw the file and one of them promised to fix the
5 problem. Hutchings Dep. at 58-59. The Plaintiff did not inform
6 Burnett that this confidential file was easily accessible. *Id.* 62-63.

7 When Burnett learned of this incident, he met with the Plaintiff
8 and expressed concern that the Plaintiff had not brought the matter to
9 his attention. Deposition of Richard K. Burnett, February 21, 2007,
10 at 57. The subject of the computers the Plaintiff had purchased the
11 previous year came up, and Burnett attempted to buy the computers back
12 from the Plaintiff. Hutchings Dep. at 66-70. At a subsequent
13 meeting, BFT offered to replace the hard drives on the Plaintiff's
14 computers or to pay to have them erased. The Plaintiff indicated that
15 he would only return the hard drives if at least two members of the
16 Board of Directors ("the Board") were present. *Id.* at 71-72. The
17 Plaintiff has testified that he refused to return the hard drives at
18 this point because "my intent was that this information be divulged to
19 somebody who could resolve it, to get it fixed." *Id.* at 71.

20 On April 27, 2005, the Plaintiff began to circulate a petition to
21 other BFT employees. The petition noted, "extremely sensitive
22 information, specific to the personal identities of [BFT's] employees,
23 has repeatedly been compromised and followed up with a disturbing
24 attempt to cover up the wrong." Hutchings Decl. ¶ 10, Ex. A. The
25 petition also expressed the employees' concern that these security
26 lapses, "have put Ben Franklin Transit's future in a vulnerable

1 position." *Id.* On the same day, the Plaintiff notified Burnett that
2 he and other employees wished to attend the May 12 meeting of the
3 Board. Hutchings Decl. ¶ 10; Burnett Decl. ¶ 4.

4 The Plaintiff initially contacted other employees about signing
5 the petition at work. Deposition of Norma Weir, August 15, 2005, at
6 6. On at least two occasions, the Plaintiff continued to ask
7 employees to sign the petition after they had previously declined. *Id.*
8 at 6, 39. Nine or ten BFT employees contacted Norma Weir, a DAR union
9 representative, indicating that they felt threatened or intimidated by
10 the Plaintiff when he contacted them about signing the petition. *Id.*
11 at 38-40. Following these complaints, Weir and two other employees
12 contacted Burnett to express their concerns that the Plaintiff had
13 access to their confidential information. Burnett Dep. at 99-103.

14 On May 5, 2005, the Plaintiff attended two additional meetings
15 during which BFT personnel attempted to retrieve the confidential
16 information that had been left on the Plaintiff's computers.
17 Hutchings Dep. at 82-83; Declaration of Timothy Frederickson, June 28,
18 2005, ¶¶ 6-7. On May 9, the Plaintiff emailed Carol Moser, a Board
19 member, expressing his concerns about information security and
20 requesting to meet with the Board prior to their May 12 meeting.
21 Declaration of Timothy Frederickson, March 1, 2007, Ex. A. The
22 Plaintiff also asked Moser to distribute the petition to the rest of
23 the Board. Hutchings Dep. at 116-17.

24 On May 12, BFT contacted the Plaintiff by letter and ordered him
25 to return the confidential information by 5:00 p.m. Hutchings Dep. at
26 111. The Plaintiff failed to comply with this directive, explaining

1 at his deposition, "I was going to tell the Board of Directors what
2 was going on before [BFT] got the computers." *Id.* at 119. That
3 evening, the Plaintiff and 20 other BFT employees attended the public
4 portion of the Board meeting. The Plaintiff contends that the Board
5 "refused to even acknowledge their presence." Hutchings Decl. ¶ 16.
6 The Plaintiff further alleges that, while he was permitted to attend
7 the executive session of the Board meeting, the Board refused to hear
8 his concerns in view of his failure to comply with BFT's earlier
9 directive to return the computers. *Id.*

10 On May 13, BFT scheduled a meeting between the Plaintiff,
11 Burnett, and Debra Hughes of BFT's Human Resources. Hutchings Dep
12 at 122. When BFT notified the Plaintiff about this meeting, he
13 contacted the TriCity Herald. Deposition of Stephen Hutchings,
14 January 17, 2007, Ex. 4 at 14. The Plaintiff attended the meeting
15 and, during a break, spoke with a reporter from the TriCity Herald.
16 Hutchings Dep. at 123-23. The following day, the TriCity Herald ran a
17 front page article about the Plaintiff's situation. Deposition of
18 Stephen Hutchings, January 17, 2007, Ex. 4 at 14.

19 On May 16, BFT placed the Plaintiff on paid administrative leave.
20 Burnett Decl., Ex. D. Following a disciplinary hearing on June 1, BFT
21 demoted the Plaintiff from his position in dispatch to a DAR driver.
22 Burnett Dep. at 114.

23 In a further attempt to retrieve the computers or the information
24 they contained, BFT filed a civil action against the Plaintiff in June
25 of 2005, alleging trespass to chattels, misappropriation of trade
26 secrets, and conversion. Declaration of Shannon E. Phillips, March 2,

1 2007, Ex. H. In response to BFT's request for a preliminary
2 injunction, the Washington Superior Court ordered the Plaintiff to
3 give the hard drives to a third party neutral. Hutchings Decl. Ex. E,
4 ¶ 2. On March 23, 2006, the Superior Court denied BFT's motion for
5 summary judgment, but found that the information on the hard drives
6 belonged to BFT. BFT then voluntarily dismissed the suit. Hutchings
7 resumed his duties as a DAR driver on July 17, 2006. Hutchings Decl.
8 ¶ 19.

9 The Plaintiff filed the instant law suit in Benton County
10 Superior Court alleging four causes of action: wrongful retaliation in
11 violation of public policy, defamation, false light, and a Section
12 1983 claim. Compl. ¶¶ 3.1-6.4. The Section 1983 claim alleged
13 deprivations of the Plaintiff's rights under the First and Fourteenth
14 Amendments. The Defendants removed the action to this Court on June
15 16, 2006, (Ct. Rec. 1.), and moved for summary judgment on March 2,
16 2007. (Ct. Rec. 21.)

17 In his response to the Defendant's motion for summary judgment,
18 the Plaintiff abandoned all of his claims except the Section 1983
19 claim alleging deprivation of his First Amendment rights. The
20 Defendant's motion for summary judgment on the Plaintiff's remaining
21 1983 claim is now before the Court.

22 **DISCUSSION**

23 **III. LEGAL STANDARD**

24 A moving party is entitled to summary judgment when there are no
25 genuine issues of material fact in dispute and the moving party is
26 entitled to judgment as a matter of law. Fed. R. Civ. P. 56; Celotex

1 *Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 2553, 91 L. Ed.
2 2d 265, 273-74 (1986). "A material issue of fact is one that affects
3 the outcome of the litigation and requires a trial to resolve the
4 parties' differing versions of the truth." *S.E.C. v. Seaboard Corp.*,
5 677 F.2d 1301, 1306 (9th Cir. 1982).

6 Initially, the party moving for summary judgment bears the burden
7 of showing that there are no issues of material fact for trial.
8 *Celotex*, 477 U.S. at 323, 106 S. Ct. at 2553, 91 L. Ed. 2d at 274.
9 Where the moving party does not bear the burden of proof at trial, it
10 may satisfy this burden by pointing out that there is insufficient
11 evidence to support the claims of the nonmoving party. *Id.* at 325;
12 106 S. Ct. at 2554; 91 L. Ed. 2d at 275.

13 If the moving party satisfies its burden, the burden then shifts
14 to the nonmoving party to show that there is an issue of material fact
15 for trial. Fed. R. Civ. P. 56(e), *Celotex*, 477 U.S. at 324; 106 S.
16 Ct. at 2553; 91 L. Ed. 2d at 275. There is no issue for trial "unless
17 there is sufficient evidence favoring the non-moving party for a jury
18 to return a verdict for that party." *Anderson v. Liberty Lobby, Inc.*,
19 477 U.S. 242, 249, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202, 212
20 (1986). Conclusory allegations alone will not suffice to create an
21 issue of material fact. *Hansen v. United States*, 7 F.3d 137, 138 (9th
22 Cir. 1993). Rather, the non-moving party must present admissible
23 evidence showing there is a genuine issue for trial. Fed. R. Civ. P.
24 56(e); *Brinson v. Linda Rose Joint Venture*, 53 F.3d 1044, 1049 (9th
25 Cir. 1995).

II. RETALIATION UNDER SECTION 1983

In order to establish a cause of action for retaliation in the context of the First Amendment under Section 1983, the Plaintiff must prove three elements:

- 1) The Plaintiff engaged in protected speech;
- 2) The Defendant took an adverse employment action against the Plaintiff; and
- 3) The Plaintiff's protected speech was a "substantial or motivating factor" for the adverse employment action.

Thomas v. City of Beaverton, 379 F.3d 802, 808 (9th Cir. 2004). Once the Plaintiff has established these three elements, the burden shifts to the Defendant to show that the "employer's legitimate administrative interest outweighs the employee's First Amendment rights" under the test established in *Pickering v. Board of Education*, 391 U.S. 563, 568, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968). *Id.*

The Defendants challenge the Plaintiff's ability to satisfy the first element of a prima facie case, arguing that the Plaintiff did not engage in protected speech. The Defendants also argue that BFT's interest in efficient agency operation outweighs the Plaintiff's interest in free speech.

A. Protected Speech

The Supreme Court has repeatedly affirmed that the government may constitutionally restrict the speech of its employees more stringently than that of the general public. *Pickering v. Board of Educ.*, 391 U.S. at 568; 88 S. Ct. at 1734; 20 L. Ed. 2d at 817 (1968); *City of San Diego v. Roe*, 543 U.S. 77, 78, 125 S. Ct. 521, 523, 160 L. Ed. 2d

1 410, 414 (2004). Nevertheless, if an employee speaks about "a matter
2 of public concern," the government bears the burden of showing that
3 its interests in promoting the efficiency of the public services it
4 performs through its employees outweighs the employee's interests in
5 speaking. *Pickering*, 391 U.S. at 568, 88 S. Ct. at 1753, 20 L. Ed. 2d
6 at 817.

7 Whether an employee's speech touches on a matter of public
8 concern is a question of law to be determined by the Court. *Cochran*
9 *v. City of Los Angeles*, 222 F.3d 1195, 1200 (9th Cir. 2000). In
10 making this determination, courts examine the "content, form, and
11 context" of the speech. *Connick v. Myers*, 461 U.S. 138, 147-148
12 (1983); *City of San Diego v. Roe*, 543 U.S. at 83, 125 S. Ct. at 525,
13 160 L. Ed. 2d at 417. The content of the speech is the most important
14 factor. *Thomas*, 379 F.3d at 810.

15 **1. Content**

16 Speech touches on a matter of public concern when it "concerns
17 issues about which information is needed or appropriate to enable the
18 members of society to make informed decisions about the operation of
19 their government." *Alpha Energy Savers, Inc. v. Hansen*, 381 F.3d 917,
20 924 (9th Cir. 2004) (citing *Coszalter v. City of Salem*, 320 F.3d 968,
21 973 (9th Cir. 2003)). It follows that speech necessarily touches on a
22 matter of public concern when it concerns "corruption, wrongdoing,
23 misconduct, wastefulness, or inefficiency by other government
24 employees." *Id.* at 926. The Supreme Court has also indicated that
25 speech bearing on an agency's continuing viability and "efficient
26 performance of its duties" involves a matter of public concern.

1 *Connick*, 461 U.S. at 148; 103 S. Ct. at 1690, 75 L. Ed. 2d at 720.
2 *See also Ulrich*, 308 F.3d at 979 (criticism of a city department's
3 decision to discharge a class of physicians involved a matter of
4 public concern because it raised questions about the hospital's
5 ability to care for its patients); *Gilbrook v. City of Westminster*,
6 177 F.3d 839, 866 (9th Cir. 1999) (holding that employee who questioned
7 the city's ability to effectively respond to fires in the wake of
8 budget cuts engaged in protected speech); *McKinley v. City of Eloy*,
9 705 F.2d 1110, 1114 (9th Cir. 1983) (holding that criticism of a city's
10 failure to increase pay for police officers involved a matter of public
11 concern because "compensation levels undoubtedly affect the ability of
12 the city to attract and retain qualified police personnel and the
13 competency of the police force is surely a matter of great public
14 concern").

15 In contrast, "individual personnel disputes and grievances" are
16 generally not considered matters of public concern. However, where an
17 employee voices concerns about the treatment of other employees,
18 rather than merely complaining about the speaker's own job status, the
19 speech may touch on a matter of public concern. *Thomas*, 379 F.3d at
20 808. *See also Ulrich*, 308 F.3d at 978 (holding that a doctor's
21 protests concerning the discharge of other physicians touched on a
22 matter of public concern); *Hyland v. Wonder*, 972 F.2d 1129, 1138 (9th
23 Cir. 1992) (holding that a memorandum calling for the termination of a
24 public official touched on a matter of public concern because the
25 employee "spoke in order to bring wrongdoing to light . . . [not]
26 merely to further some purely private interest").

1 The Court finds that the content of the Plaintiff's speech
2 involved a matter of public concern. The Plaintiff's circulation of
3 the petition and his attempts to bring his concerns before the Board
4 raise at least two issues of public concern. First, the Plaintiff and
5 his co-workers expressed concerns about BFT's "financial future," an
6 issue that bears on BFT's ability to perform its public function.
7 Second, the petition alleges that BFT attempted to "cover up" the fact
8 that it negligently released its employees' confidential information.
9 An attempt by a government agency to prevent its employees and the
10 public from learning about such a security lapse is sufficiently
11 misfeasant to raise issues of public concern.

12 Contrary to the Defendant's argument, the Plaintiff's speech
13 addressed more than an individual workplace grievance. While BFT's
14 release of confidential information did affect the Plaintiff
15 personally, it also affected many other BFT employees. Following
16 *Thomas, Ulrich, and Hyland*, a workplace problem common to many public
17 employees may raise an issue of public concern.

18 2. Context

19 In examining the context of speech, courts should consider "the
20 point of the speech," including the motivation driving the speaker and
21 the audience he or she chooses. *Chateaubriand v. Gaspard*, 97 F.3d
22 1218, 1223 (1996); *Gilbrook*, 177 F.3d at 866. However, these factors
23 are not necessarily determinative. An employee who chooses to address
24 an issue internally does not forfeit First Amendment protections so
25 long as the issue addresses a matter of public concern. *Thomas*, 379
26 F.3d at 810-811; *Ulrich*, 308 F.3d at 979.

1 Here, the Plaintiff addressed his concerns to other employees and
2 BFT's Board of Directors, the body he believed best able to resolve
3 the problem. Under the case law cited above, the fact that the he did
4 not address his speech to the general public does not diminish the
5 protected status of the speech. The Court finds no merit in the
6 Defendant's contention that the Plaintiff only notified the Board
7 after he was facing disciplinary charges. The materials submitted by
8 the parties bear out the Plaintiff's claim that he began circulating
9 his petition in April, well before BFT placed him on administrative
10 leave or demoted him.

11 The Court accordingly holds that the Plaintiff's speech addressed
12 a matter of public concern. For the purpose of evaluating the present
13 motion, the Court assumes that the Plaintiff will be able to establish
14 the three elements of a retaliation claim at trial. The Court now
15 turns to the Defendant's argument that its legitimate administrative
16 concerns outweigh the Defendant's interest in the protected speech.

17 **B. Government's Interest**

18 When an employee's speech addresses a matter of public concern,
19 the Court must balance the employee's interest, "as a citizen, in
20 commenting upon matters of public concern and the interest of the
21 State, as an employer, in promoting the efficiency of the public
22 services it performs through its employees." *Pickering*, 391 U.S. at
23 568; 88 S. Ct. at 1734-35; 20 L. Ed. 2d at 817. "The government's
24 interest in achieving its goals as effectively and efficiently as
25 possible is elevated from a relatively subordinate interest when it
26 acts as sovereign to a significant one when it acts as employer."

1 *Waters v. Churchill*, 511 U.S. 661, 675, 114 S. Ct. 1878, 1888, 128 L.
2 Ed. 2d 686, 699 (1994). This interest is further enhanced when the
3 employee serves in a public contact role. *Moran v. Washington*, 147
4 F.3d 839, 849-50 (9th Cir. 1998).

5 In conducting the *Pickering* balancing, the Court should consider
6 such issues as whether the employee's speech

7 impairs discipline by superiors or harmony among co-workers,
8 has a detrimental impact on close working relationships for
9 which personal loyalty and confidence are necessary, or
impedes the performance of the speaker's duties or
interferes with the regular operation of the enterprise.

10 *Pool v. Vanrheen*, 297 F.3d 899, 908-09 (9th Cir. 2002); *Cochran v.*
11 *City of Los Angeles*, 222 F.3d 1195, 1201 (9th Cir. 2000); *Rankin*, 483
12 U.S. at 388, 107 S. Ct. at 2899, 97 L. Ed. 2d at 327. The Court
13 should also consider the "manner, time and place of the employee's
14 expression." *Id.* The government need not demonstrate that the
15 employee's speech actually disrupted the workplace; "reasonable
16 predictions of disruption" will suffice. *Hudson v. Craven*, 403 F.3d
17 691, 700 (9th Cir. 2005); *Brewster v. Bd. of Educ.*, 149 F.3d 971, 980
18 (9th Cir. 1998); *Waters v. Churchill*, 511 U.S. 674, 114 S. Ct. at
19 1887, 128 L. Ed. 2d at 698.

20 The Court finds that BFT's interest in efficiently providing
21 public transportation outweighs the Plaintiff's interest in circulating
22 his petition at work. Applying the factors identified in *Rankin*, it
23 appears that the Plaintiff's speech undermined the authority of, and
24 thereby the discipline imposed by, his superiors. The evidence before
25 the Court, which largely consists of the Plaintiff's own testimony,
26 indicates that BFT's management made numerous attempts to retrieve the

1 confidential information and/or the computers from the Plaintiff. The
2 Plaintiff admits that he consistently refused to return the computers
3 when directed to do so, either because he believed he was entitled to
4 the benefit of his bargain or because he wished to bring the perceived
5 security breach to the attention of the Board. While the prior
6 motivation is understandable and the latter commendable, neither
7 negates the fact that the Plaintiff refused to follow the direction of
8 his superiors. Not only did the Plaintiff fail to comply with
9 management, he also circulated a petition that criticized management
10 by attributing to it the very security breach his own refusal to
11 cooperate was perpetuating.

12 The evidence before the Court also indicates that the Plaintiff's
13 circulation of his petition was detrimental to workplace
14 relationships. Burnett and Weir have testified that multiple BFT
15 employees felt threatened by the Plaintiff's attempts to persuade them
16 to sign the petition. While the Plaintiff has questioned Weir's
17 credibility, this dispute of fact is immaterial under the *Pickering*
18 balancing test. Even if the Court assumes that Weir overstates the
19 number of employees who felt threatened by the Plaintiff's actions,
20 BFT would nevertheless have grounds for a "reasonable prediction of
21 disruption."

22 Finally, the Plaintiff's own testimony demonstrates that the
23 manner, time, and place of the his speech was disruptive. In
24 discussing the petition with other employees during the workday, the
25 Plaintiff caused himself and others to leave their work. This action
26 "supports [the employer's] fears that the functioning of [its] office

1 was endangered." *Connick*, 461 U.S. at 153, 103 S. Ct. at 1693, 75 L.
2 Ed. 2d at 724.

3 **CONCLUSION**

4 A government employee has a First Amendment right to speak about
5 matters of public concern. The government may nevertheless restrict
6 the speech of its employees if the speech creates an actual or
7 potential disturbance in efficient government operations, and the
8 government's interest in maintaining its efficiency is greater than
9 the employee's interest in free speech. In this case, the Plaintiff's
10 speech involved a matter of public concern. However, the Plaintiff's
11 exercise of his free speech rights interfered with efficient
12 operations of the agency that employed him. BFT's interest in
13 operating efficiently was greater than the Plaintiff's interest in
14 circulating his petition during work hours. It was also greater than
15 the Plaintiff's interest in appearing before the Board of Directors
16 prior to returning the confidential information. BFT's motion for
17 summary judgment is therefore granted. Accordingly,

18 **IT IS HEREBY ORDERED** that the Defendant's Motion for Summary
19 Judgment, Ct. Rec. 21, is **GRANTED**.

20 **IT IS SO ORDERED.** The District Court Executive is hereby
21 directed to enter this order and furnish copies to counsel.

22 **DATED** this 28th day of June, 2007.

23
24 s/ Fred Van Sickle
Fred Van Sickle
25 United States District Judge
26